APPENDIX A

The regulations at issue were first published, with preamble, in 39 Fed. Reg. 42509 *et seq.* (December 5, 1974) (40 C.F.R. §§ 50.01(d), (f), and 52.21). The text of the regulations within 39 Fed. Reg. 42509, *as amended*, 40 Fed. Reg. 2802 (January 16, 1975), 40 Fed. Reg. 25004 (June 12, 1975), and 40 Fed. Reg. 42011 (September 10, 1975) and a pertinent part of the preamble are set out in this appendix.

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

§ 52.01 Definitions.

• • • • •

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications,

the source is designed to accommodate such alternative use.

* * * * *

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

* * * * *

§52.21 Significant deterioration of air quality.

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards.

The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Specific disapprovals are listed, where applicable, in Subparts B through DDD of this part. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) "Facility" means an identifiable piece of process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection or installation of a stationary source.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction

or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. The provisions of this paragraph do not apply in those counties or other functionally equivalent areas that pervasively exceeded any national ambient air quality standards during 1974 for sulfur dioxide or particulate matter and then only with respect to such pollutants. States may notify the Administrator at any time of those areas which exceeded the national standards during 1974 and therefore are exempt from the requirements of this paragraph.

(2)(i) For purposes of this paragraph, areas designated as Class I or II shall be limited to the following increases in pollutant concentration occurring since January 1, 1975:

Area designations

Pollutant	Class I ($\mu g/m^3$)	Class II ($\mu g/m^3$)
Particulate matter:		
Annual geometric means	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(iii) The air quality impact of sources granted approval to construct or modify prior to January 1, 1975 (pursuant to the approved new source review procedures in the plan) but not yet operating prior to January 1, 1975, shall not be counted against the air quality increments specified in paragraph (c)(2)(i) of this section.

(3)(i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) the State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(a) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(b) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(c) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(d) The proposed redesignation is based on the record of the State's hearing, which must reflect the

basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(e) The redesignation is proposed after consultation with the elected leadership of local and other sub-state general purpose governments in the area covered by the proposed redesignation.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(a) The redesignation is consistent with adjacent State and privately owned land, and

(b) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(a) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c) (3) (ii) and,

(b) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where

States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(a) The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c) (3)(ii) and,

(b) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(a) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (*1*) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (*2*) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)*(d)* of this paragraph, or (*3*) that the State has not requested and received delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(b) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (*2*) that the Federal Land Manager has arbitrarily

and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)*(d)* of this paragraph.

(c) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (*2*) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)*(d)* of this paragraph.

(d) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(e) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

(f) The requirements of paragraph (c)(3)(vi)*(a)*(3) that a State request and receive delegation of the new source review requirements of this section as a condition to approval of a proposed redesignation, shall include as a minimum receiving the administrative and technical functions of the new source review. The Administrator will carry out any required enforcement

action in cases where the State does not have adequate legal authority to initiate such actions. The Administrator may waive the requirements of paragraph (c)(3)(vi)*(a)*(3) if the State Attorney-General has determined that the State cannot accept delegation of the administrative/technical functions.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) The provisions of this paragraph have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this paragraph is so incorporated, the requirements of this paragraph apply to any new or modified stationary source of the type identified below which has not commenced construction or modification prior to June 1, 1975 except as specifically provided below. A source which is modified, but does not increase the amount of sulfur oxides or particulate matter emitted, or is modified to utilize an alternative fuel, or higher sulfur content fuel, shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.

(ii) Coal Cleaning Plants.

(iii) Kraft Pulp Mills.

(iv) Portland Cement Plants.

(v) Primary Zinc Smelters.

(vi) Iron and Steel Mills.

(vii) Primary Aluminum Ore Reduction Plants.

(viii) Primary Copper Smelters.

(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.

(x) Sulfuric Acid Plants.

(xi) Petroleum Refineries.

(xii) Lime Plants.

(xiii) Phosphate Rock Processing Plants.

(xiv) By-Product Coke Oven Batteries.

(xv) Sulfur Recovery Plants.

(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.

(xvii) Fuel Conversion Plants.

(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this

paragraph; reduction in emissions from existing sources which contributed to air quality during all or part of 1974; and general commercial, residential, industrial, and other sources of emissions growth not exempted by paragraph (c)(2)(iii) of this section which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval, which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by paragraph (d)(2) of this section, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or

modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since January 1, 1975.

(4)(i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act, to the maximum extent feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e) (1) (ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall;

(a) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(b) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(c) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of

the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land Manager or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1) (ii), (iv), or (v) of this section by no more than 30 days or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting

source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropriate State and local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for managing land use, such agency shall consult with the appropriate State and local agency which is primarily responsible for managing land use prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii)*(c)* of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal Land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.

[The following portion of the preamble to the regulations is pertinent to this petition and is quoted in part therein. It appears at 39 Fed. Reg. 42512-13 (Dec. 5, 1974)]

There were several questions raised concerning the appropriate size of an area which should be considered for redesignation. Calculations have shown that because of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends well beyond the Class I boundaries into the adjacent areas. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an addi-

tional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

The distance a large source would need to be located away from a Class I boundary is more dependent on the meteorological conditions in the area rather than the size of the source. Where very long pollutant travel times from the source to the receptor are involved, the assumptions concerning the persistence of wind direction and atmospheric stability are critical. At some point, it can be assumed that a receptor will be virtually unaffected by a source, regardless of the source strength, since the critical meteorological conditions would not be expected to persist long enough to move the pollutants from source to receptor for any significant period of time. This distance is, of course, dependent on local meteorological conditions, but for most areas the maximum distance would be 60 to 100 miles.

APPENDIX B

Relevant excerpts from the Constitution of the United States are as follows:

ARTICLE III

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX C

Relevant excerpts from the Clean Air Act, *as amended*, 42 U.S.C. § 1857 *et seq.*, are as follows:

§ 1857. [§ 101.] Congressional findings; purposes of subchapter

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

* * * *

§ 1857c—2. [§ 107.] Air quality control regions—Responsibility of State for air quality; submission of implementation plan

(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * *

§ 1857d—1. [§ 116.] Retention of State authority

Except as otherwise provided in sections 1857c—10(c), (e), and (f), 1857f—6a, 1857f—6c(c)(4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

* * * *

§ 1857f. [§ 118.] Control and abatement of air pollution from Federal facilities; compliance of Federal departments, etc., with Federal, State, interstate, and local requirements; exemption by President of any emission source from any executive branch department, etc.; report to Congress

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 1857c—6 of this title, and an exemption from section 1857c—7 of this title may be granted only in accordance with section 1857c—7 (c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted

during the preceding calendar year, together with his reason for granting each such exemption.

* * * *

§ 1857h—2. [§ 304.] Citizen suits—Establishment of right to bring suit

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

* * * *

Non-restriction of other rights

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

* * * *

§ 1857h—5. [§ 307.] Administrative proceedings and judicial review

* * * *

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c—7 of this title, any standard of performance under section 1857c—6 of this title, any standard under section 1857f—1 of this title (other than a standard required to be prescribed under section 1857f—1 (b) (1) of this title), any determination under section 1857f—1(b) (5) of this title, any control or prohibition under section 1857f—6c of this title, or any standard under section 1857f—9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c—5 of this title or section 1857c—6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

APPENDIX D

The following Memorandum appears in 7 BNA Environmental Reporter, No. 23, at 859 (Oct. 8, 1976).

ENVIRONMENTAL PROTECTION AGENCY GUIDANCE MEMORANDUM ON SIGNIFICANT DETERIORATION REGULATIONS — DATED SEPTEMBER 28, 1976

SUBJECT: Additional Guidance on Prevention of Significant Deterioration (PSD) Regulations

FROM: Roger Strelow
Assistant Administrator
for Air and Waste Management (AW-443)

MEMO TO: Regional Administrators

Questions arising from the Regions have indicated the need for further headquarters guidance on various aspects of the PSD regulation (40 CFR 52.21).

A. Several questions relate to 40 CFR 52.21 (d) (5), which reads as follows:

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

The purpose of paragraph (d) (5) is to insure that while a governing body is seriously pursuing the redesignation of an area to Class I, the redesignation will not be compromised or nullified by a new or modified source. I would like to stress several basic points about this provision:

1. The issue of which was first in time — the source's permit application or the governing body's announcement of resdesignation consideration — is irrelevant under paragraph (d) (5). If the governing body announces such reconsideration any time before a final permit has been issued, paragraph (d) (5) will be triggered.

2. A proposed source need not be located within the political boundaries of the governing body considering the redesignation in order for paragraph (d) (5) to apply. If the source's emissions could pose a threat to the proposed redesignation, then final permit approval would have to be withheld pending EPA's action on the proposed redesignation.

As is true of most aspects of the PSD regulations, the Regions will have to exercise their sound judgment on a case-by-case basis in determining whether a proposed source would be located far enough from the political boundaries of the governing body so as not to pose a threat to the proposed redesignation. This type of judgment should not present novel problems for the Regions, since the PSD regulation ultimately requires (in paragraph (d) (2) (i)) a finding that a source will not violate the applicable increments in any surrounding areas.

I realize that one could read paragraph (d) (5) in a very literal fashion to apply only to sources which would be constructed within the political boundaries of the governing body considering the redesignation. This interpretation would, however, do violence to the basic purpose of the PSD regulation (which is to insure that applicable air quality increments are not violated by new sources, without regard to the political boundaries a source might choose to locate within), and would do violence to the basic intent of paragraph (d) (5) (which

is to insure that a pending redesignation will not be jeopardized by a new source).

3. Paragraph (d) (5) will be triggered even where a governing body "announces consideration" of a proposed redesignation. There is good reason for allowing such an early triggering event, since EPA regulations and guidelines require the governing body to go through several procedural steps (including detailed document preparation) before the redesignation can even be formally proposed. If this approach were not taken, then a governing body which was actively and expeditiously endeavoring to secure a redesignation could still find the redesignation compromised or nullified by an intervening permit approval.

We must recognize, however, the potential for abuse in such a clause and take care to guard against it. The clause must not operate to allow a governing body to frustrate construction of a source if that governing body does not seriously intend to pursue a redesignation or does not pursue it actively and expeditiously.

Therefore, whenever a governing body announces it is considering a redesignation,[1] and that announcement would affect a proposed source's application, EPA should make clear to the governing body (in writing) that new source approvals will be withheld only so long as the governing body is actively and expeditiously proceeding towards redesignation. EPA should set forth a reasonable schedule of action considering all

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[1] No special form of "announcement" is required. Any evidence that the governing body, or an appropriate official thereof, has seriously determined to consider redesignation and has communicated this determination in writing to EPA should suffice. In any event, as discussed in the text above, the form of announcement is not nearly as important as the governing body's follow-up actions in determining whether paragraph (d) (5) should hold up a permit.

the circumstances of each case[2] and notify the governing body that any significant departure from that schedule, or any other evidence that the governing body is not actively and expeditiously pursuing redesignation, would be considered grounds for EPA to suspend the operation of paragraph (d) (5) and complete action on permits being withheld.

Such a suspension of paragraph (d) (5) should not occur automatically upon the failure of a governing body to meet a given deadline. Again, all relevant circumstances would have to be weighed. For instance, if a delay were caused through no fault of the governing body, it would probably be improper to suspend paragraph (d) (5). The main point is that EPA must remain satisfied that the governing body is doing all that can reasonably be expected to process the redesignation actively and expeditiously.

4. Paragraph (d) (5) only restricts EPA from granting permit *approval* while a redesignation is pending. A Region may therefore carry out all other provisions of paragraphs (d) and (e) in this period (*if* it chooses). This might have the salutary effect of "keeping the heat" on the governing body to complete its redesignation procedures. It might also, however, constitute in a Region's judgment an unwarranted diversion of resources for a permit which may never be issued. The Regions should use their own judgment in this area.

5. A Region may grant a permit pending a redesignation if the Region determines that the source would not violate the increments which would result from the redesignation.

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[2] *I.e.*, type of governing body (State? Indian Tribe?), number of potentially-affected jurisdictions, number of other governmental approvals needed, size of area affected, etc. It would probably be wise to develop this schedule in consultation with representatives of the governing body.

6. When a potential applicant contracts a Region about initiating the permit process, the Region should make the applicant aware of the implications of paragraph (d) (5) so that the applicant may be encouraged to complete its application expeditiously. Obviously, whenever paragraph (d) (5) is triggered, the Region should immediately notify those whose permit applications will be affected.

B. A question has been raised concerning the applicability of the PSD regulations to certain kinds of coal cleaning plants [§52.21 (d) (1) (ii)], specifically those that do not utilize a thermal dryer. Although the wording of the proposal of §52.21 (d) (1) (ii) read "coal cleaning plants (thermal dryers)" the final regulations read simply "coal cleaning plants." Region VIII has recently interpreted the PSD regulation to cover all coal cleaning plants, regardless of whether a thermal dryer is used. Region VIII's interpretation is correct.

C. One Region has questioned whether a PSD permit can be conditioned to require emission control that goes beyond best available control technology (as when a power plant intends to use low sulfur coal and a flue gas scrubber and will be well below the NSPS for SO_2 from power plants). Unless it is necessary to meet the applicable air quality increment, we can not *require* a source to go beyond BACT. However, should a source indicate on its permit application that its emissions will be less than that which we would ordinarily define as BACT, the lesser emission rate may be made an enforceable condition of the permit. The legally enforceable emission rate should be used for purposes of keeping track of the unused portion of the increment. Obviously, the situation where actual emissions are less than the legally enforceable emission rate presents the potential for a source to "hoard" a major portion of the remaining increment for future expansion. There-

fore, where a source will go beyond BACT, Regions should attempt to make the lesser emissions a legally binding permit condition.

D. Finally, some Regional Offices have requested a change to the PSD regulations enabling the Regional Administrator to require the applicants to perform the necessary diffusion modeling. We feel, and OGC concurs, that adequate authority to require such analysis is presently provided under §52.21 (d) (3), which indicates that EPA can require a source to submit ". . . information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels . . . ".

cc: Regional Counsels
Regional Air Directors
Regional Enforcement Directors

APPENDIX E

The following parties to the consolidated proceedings in the court below are not, insofar as petitioners can determine, adverse to the positions taken in this petition, but are Rule 21(4) respondents:

BUCKEYE POWER, INC.
OHIO VALLEY ELECTRIC CORPORATION
INDIANA-KENTUCKY ELECTRIC CORPORATION
INDIANA & MICHIGAN ELECTRIC CORPORATION
INDIANA STATEWIDE RURAL ELECTRIC COOPERATIVE, INC.
INDIANAPOLIS POWER AND LIGHT COMPANY
NORTHERN INDIANA PUBLIC SERVICE COMPANY
PUBLIC SERVICE COMPANY OF INDIANA, INC.
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY
AMERICAN PETROLEUM INSTITUTE
STANDARD OIL COMPANY
ATLANTIC-RICHFIELD COMPANY
CONTINENTAL OIL COMPANY
EXXON CORPORATION
GULF OIL CORPORATION
MOBIL OIL CORPORATION
SHELL OIL CORPORATION
TEXACO, INC.
UNION OIL COMPANY OF CALIFORNIA
UTAH POWER AND LIGHT COMPANY
PUBLIC SERVICE COMPANY OF COLORADO
PLATT RIVER POWER AUTHORITY
CHEYENNE LIGHT, FUEL AND POWER COMPANY
ALABAMA POWER COMPANY
GEORGIA POWER COMPANY
GULF POWER COMPANY

Mississippi Power Company
Edison Electric Institute
Kentucky Utilities Company
Cincinnati Gas & Electric Company
The Cleveland Electric Illuminating Company
Columbus and Southern Ohio Electric Company
The Dayton Power and Light Company
Kentucky Power Company
Ohio Edison Company
Ohio Power Company
Pacific Coal Gasification Company
Transwestern Coal Gasification Company
Montana Power Company
Pacific Power and Light Company
Portland General Electric Company
Puget Sound Power & Light Company
Washington Water Power Company